

HOUSE JUDICIARY COMMITTEE SUBSTITUTE FOR
HOUSE BILLS 151 & 614

49TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2009

AN ACT

RELATING TO ETHICS; ENACTING THE STATE ETHICS COMMISSION ACT;
CREATING THE STATE ETHICS COMMISSION; PROVIDING POWERS AND
DUTIES; ALLOWING ANNUAL ETHICS TRAINING AND THE PUBLICATION OF
ETHICS GUIDES; REQUIRING THE DEVELOPMENT OF A PROPOSED ETHICS
CODE FOR THE EXECUTIVE BRANCH; GRANTING SUBPOENA POWERS;
ALLOWING ISSUANCE OF ADVISORY OPINIONS RELATED TO CERTAIN
ETHICS VIOLATIONS; PROVIDING FOR THE FILING OF COMPLAINTS
AGAINST STATE OFFICIALS, STATE EMPLOYEES, GOVERNMENT
CONTRACTORS AND LOBBYISTS FOR CERTAIN ETHICS VIOLATIONS;
ESTABLISHING INVESTIGATIONS OF COMPLAINTS FOR CERTAIN ETHICS
VIOLATIONS; PROVIDING PENALTIES; MAKING AN APPROPRIATION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.--This act may be cited as the
"State Ethics Commission Act".

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1 Section 2. DEFINITIONS.--As used in the State Ethics
2 Commission Act:

3 A. "commission" means the state ethics commission;

4 B. "commissioner" means a person appointed to the
5 state ethics commission;

6 C. "ethics violation" means any action that amounts
7 to a violation of the Gift Act, the Governmental Conduct Act,
8 the Procurement Code, the Lobbyist Regulation Act, the
9 Financial Disclosure Act, Chapter 1, Article 19 NMSA 1978 or
10 any code of ethics adopted pursuant to those laws or Section 4
11 of the State Ethics Commission Act;

12 D. "government contractor" means a person who has a
13 contract with a state agency pursuant to the Procurement Code.
14 "Government contractor" also includes any person who has
15 submitted a competitive sealed proposal or competitive sealed
16 bid for a contract with a state agency;

17 E. "legislative body" means the house of
18 representatives or the senate;

19 F. "lobbying" means attempting to influence:

20 (1) a decision related to any matter to be
21 considered or being considered by the legislative branch of
22 state government or any legislative committee or to any
23 legislative matter requiring action by the governor or awaiting
24 action by the governor; or

25 (2) an official action;

1 G. "lobbyist" means a person who is compensated for
2 the specific purpose of lobbying; who is designated by an
3 interest group or organization to represent it on a substantial
4 or regular basis for the purpose of lobbying; or who, in the
5 course of the person's employment, is engaged in lobbying on a
6 substantial or regular basis. "Lobbyist" does not include:

7 (1) a person who appears on the person's own
8 behalf in connection with legislation or an official action;

9 (2) an elected or appointed officer of the
10 state, a political subdivision of the state or an Indian
11 nation, tribe or pueblo who is acting in the officer's official
12 capacity;

13 (3) an employee of the state or a political
14 subdivision of the state, specifically designated by an elected
15 or appointed officer, who appears before a legislative
16 committee or in a rulemaking proceeding only to explain the
17 effect of legislation or a rule on that employee's agency or
18 political subdivision; provided that the elected or appointed
19 officer keeps the designation for public inspection and files
20 it with the secretary of state;

21 (4) a designated member of the staff of an
22 elected state official; provided that the elected state
23 official keeps the designation for public inspection and files
24 it with the secretary of state;

25 (5) a legislator or legislative staff member;

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1 (6) a witness called by a legislative
2 committee or administrative agency to appear before it in
3 connection with legislation or an official action;

4 (7) a person who provides only oral or written
5 public testimony in connection with a legislative committee or
6 in a rulemaking proceeding and whose name and the interest on
7 behalf of which the person testifies have been clearly and
8 publicly identified; or

9 (8) a publisher, owner or employee of the
10 print media, radio or television, while gathering or
11 disseminating news or editorial comment to the general public
12 in the ordinary course of business;

13 H. "official action" means an action or nonaction
14 of a state official or state agency, board or commission acting
15 in a rulemaking proceeding;

16 I. "political party" means any qualified political
17 party, any of whose candidates received as much as five percent
18 of the total number of votes cast at the last preceding general
19 election for the office of governor or president of the United
20 States, as the case may be, and whose membership totals not
21 less than one-third of one percent of the statewide registered
22 voter file on the day of the governor's primary election
23 proclamation;

24 J. "respondent" means a state official, state
25 employee, government contractor or lobbyist who is the subject

1 of a complaint filed with the commission;

2 K. "state agency" means any department, commission,
3 council, board, committee, institution, agency, government
4 corporation, educational institution or official of the
5 executive, legislative or judicial branch of government of the
6 state;

7 L. "state employee" means an employee of the
8 executive, legislative or judicial branch of the state; and

9 M. "state official" means a person elected or
10 appointed to an office of the executive, judicial or
11 legislative branch of the state.

12 Section 3. STATE ETHICS COMMISSION CREATED--MEMBERSHIP--
13 TERMS--REMOVAL.--

14 A. The "state ethics commission" is created as an
15 adjunct agency. The commission consists of the following ten
16 commissioners:

17 (1) four commissioners appointed by the
18 governor, no more than two of whom shall be of the same
19 political party and at least one of whom shall be appointed
20 from each congressional district;

21 (2) one commissioner appointed by the
22 president pro tempore of the senate;

23 (3) one commissioner appointed by the minority
24 floor leader of the senate;

25 (4) one commissioner appointed by the speaker

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1 of the house of representatives;

2 (5) one commissioner appointed by the minority
3 floor leader of the house of representatives; and

4 (6) two commissioners appointed by the chief
5 justice of the supreme court, who shall not be of the same
6 political party and shall not be appointed from the same
7 congressional district.

8 B. Appointments shall be made in a manner that
9 meets the following requirements:

10 (1) all commissioners shall be residents of
11 New Mexico;

12 (2) no more than five commissioners shall be
13 registered members of the same political party and no person
14 whose party registration changed in the year prior to
15 appointment shall be appointed to the commission; and

16 (3) the appointing authorities shall give due
17 consideration to achieving geographical representation from
18 across the state.

19 C. Commissioners shall be appointed for staggered
20 terms of four years. Upon initial appointment of the
21 commission, the commissioners shall draw lots to determine
22 which three commissioners will serve an initial term of two
23 years, which three commissioners will serve an initial term of
24 three years and which four commissioners will serve an initial
25 term of four years; thereafter, all commissioners will serve

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1 four-year terms. A person shall not serve as a commissioner
2 for more than two consecutive terms.

3 D. The commission shall select a chair, vice chair
4 and other officers it deems necessary.

5 E. Six commissioners constitute a quorum for the
6 transaction of business. No action may be taken by the
7 commission unless at least six members concur.

8 F. A vacancy on the commission shall be filled by
9 appointment of the appointing authority for that commissioner's
10 position for the remainder of the unexpired term. A
11 commissioner may only be removed for incompetence, neglect of
12 duty or malfeasance in office. A proceeding for the removal of
13 a commissioner may be commenced by the commission or by the
14 attorney general upon the request of the commission. The
15 supreme court of the state of New Mexico has exclusive
16 jurisdiction over proceedings to remove commissioners, and its
17 decision shall be final. A commissioner shall be given notice
18 of hearing and an opportunity to be heard before the
19 commissioner is removed.

20 G. During a commissioner's service, a commissioner
21 shall not:

22 (1) hold or seek an elective public office, an
23 appointed public position or an office in a political party; or

24 (2) be a state employee, government contractor
25 or lobbyist.

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1 H. Commissioners shall disqualify themselves from a
2 commission proceeding that involves the appointing authority
3 who appointed the commissioner to the commission or when a
4 commissioner has a conflict of interest. Commissioners who
5 disqualify themselves shall state the reason for the
6 disqualification. If the propriety of a commissioner's
7 participation in a particular matter is questioned due to a
8 conflict of interest, the commission may disqualify that
9 commissioner from participation in a commission proceeding. A
10 disqualified commissioner shall not participate in any
11 proceedings with reference to the matter from which the
12 commissioner is disqualified, and the commissioner shall be
13 excused from that portion of any meeting at which the matter is
14 discussed. If four or more commissioners are disqualified from
15 participating in a proceeding, the remaining commissioners
16 shall appoint temporary commissioners to participate in that
17 proceeding. Appointments of temporary commissioners shall be
18 made by majority vote of the remaining commissioners and in
19 accordance with the geographical representation and political
20 party membership requirements of Subsections A and B of this
21 section.

22 I. For a period of one calendar year following the
23 expiration of a commissioner's term or following the
24 resignation or removal of the commissioner, the commissioner
25 shall not:

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1 (1) hold or seek an elective public office, an
2 appointed public position or public employment;

3 (2) represent a respondent, unless appearing
4 on the commissioner's own behalf; or

5 (3) accept employment or otherwise provide
6 services to a person or entity that is a respondent, unless the
7 commissioner accepted employment or provided services to the
8 person or entity prior to the filing of a complaint against the
9 person or entity.

10 J. Commissioners are entitled to receive per diem
11 and mileage as provided in the Per Diem and Mileage Act and
12 shall receive no other compensation, perquisite or allowance.

13 K. The commission shall meet as necessary to carry
14 out its duties pursuant to the State Ethics Commission Act.

15 Section 4. COMMISSION--POWERS--DUTIES.--

16 A. The commission shall:

17 (1) receive and investigate complaints
18 alleging ethics violations against state officials, state
19 employees, government contractors and lobbyists;

20 (2) report findings of probable cause that a
21 respondent's conduct constituted an ethics violation to the
22 respondent's appointing authority, employer, appropriate state
23 agency or appropriate legislative body;

24 (3) compile, maintain and provide public
25 access to an index of all advisory opinions, complaints and

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1 reports required to be made public pursuant to the State Ethics
2 Commission Act;

3 (4) draft a proposed code of ethics for all
4 state officials and state employees of the executive branch and
5 submit the proposed code to each elected state official of the
6 executive branch for adoption;

7 (5) develop, adopt and promulgate all
8 procedural rules necessary for the commission to implement and
9 administer the provisions of the State Ethics Commission Act,
10 including rules of procedure for investigations conducted by
11 the commission;

12 (6) employ an executive director;

13 (7) submit an annual report of its activities,
14 including any recommendations regarding state ethics laws or
15 the scope of its powers and duties, in December of each year to
16 the governor, the legislature and the chief justice of the
17 supreme court; and

18 (8) promulgate rules for the recusal of
19 members to avoid the appearance of impropriety and conflicts of
20 interest.

21 B. The commission may:

22 (1) initiate complaints alleging ethics
23 violations against state officials, state employees, government
24 contractors and lobbyists;

25 (2) issue public reprimands or censures or

1 recommend disciplinary actions in accordance with the
2 provisions of the State Ethics Commission Act for ethics
3 violations committed by state officials of the executive branch
4 and state employees;

5 (3) pursuant to governing court rules and
6 Subsection G of Section 7 of the State Ethics Commission Act,
7 request that the district court issue subpoenas under seal as
8 necessary to require the attendance of witnesses and the
9 production of accounts, books, papers, records and other
10 documents relevant to an investigation conducted by the
11 commission;

12 (4) issue advisory opinions to state
13 officials, state employees, government contractors and
14 lobbyists in accordance with the provisions of the State Ethics
15 Commission Act;

16 (5) compile, adopt, publish and provide to all
17 state officials, state employees, government contractors and
18 lobbyists an ethics guide that clearly and plainly explains the
19 ethics requirements set forth in state law;

20 (6) compile, adopt, publish and provide to all
21 state officials, state employees, government contractors and
22 lobbyists a business ethics guide that clearly and plainly
23 explains the ethics requirements set forth in state law as they
24 relate to conducting business with the state;

25 (7) offer annual ethics training to all state

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1 officials, state employees, government contractors and
2 lobbyists; and

3 (8) contract for the provisions of goods and
4 services.

5 Section 5. EXECUTIVE DIRECTOR--DUTIES--EMPLOYMENT.--

6 A. The executive director of the commission shall:

7 (1) be employed by, report directly to and
8 serve at the pleasure of the commission;

9 (2) perform all investigations on behalf of
10 the commission;

11 (3) bring complaints and investigation results
12 before the commission for consideration;

13 (4) prepare an annual budget for the
14 commission and submit it to the commission for approval; and

15 (5) make recommendations to the commission of
16 proposed rules or legislative changes needed to provide better
17 administration of the State Ethics Commission Act.

18 B. The executive director may hire a general
19 counsel for the commission and all other personnel as may be
20 necessary to carry out the responsibilities of the commission.

21 C. The executive director of the commission may
22 administer oaths and take depositions to the same extent and
23 subject to the same limitations as would apply if the
24 deposition were held pursuant to the discovery rules in a civil
25 action in the district court.

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1 D. For a period of one calendar year immediately
2 following the executive director's employment with the
3 commission, the executive director shall not:

4 (1) hold or seek an elective public office, an
5 appointed public position or public employment;

6 (2) represent a respondent, unless appearing
7 on the executive director's own behalf; or

8 (3) accept employment or otherwise provide
9 services to a person or entity that is a respondent, unless the
10 executive director accepted employment or provided services to
11 the person or entity prior to the filing of a complaint against
12 the person or entity.

13 Section 6. COMMISSION--ADVISORY OPINIONS.--

14 A. The commission may issue an advisory opinion to
15 a state official, state employee, government contractor or
16 lobbyist on matters relating to a specific set of circumstances
17 involving ethics violations. Unless amended or revoked, an
18 advisory opinion issued by the commission shall be binding on
19 the commission in any subsequent commission proceedings
20 concerning the person who requested the opinion; provided that
21 the person acted in good faith and in reliance upon the
22 opinion.

23 B. The commission shall promulgate rules for
24 issuing advisory opinions; provided that:

25 (1) advisory opinions shall be requested in

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1 writing and identify a specific set of circumstances involving
2 an ethics issue;

3 (2) all requests to the commission for
4 advisory opinions shall be confidential; and

5 (3) the commission may publish an advisory
6 opinion after omitting the name of the requesting state
7 official, state employee, government contractor or lobbyist.

8 Section 7. COMMISSION--COMPLAINTS--INVESTIGATIONS--
9 FINDINGS AND RECOMMENDATIONS--REPORTS REQUIRED--CRIMINAL
10 REFERRAL REQUIRED.--

11 A. A complaint of an alleged ethics violation
12 committed by a state official, state employee, government
13 contractor or lobbyist may be:

14 (1) filed with the commission by a person who
15 has actual knowledge of an alleged ethics violation; or

16 (2) initiated by the commission upon receipt
17 of evidence deemed sufficient by the commission of an alleged
18 ethics violation.

19 B. A person who files a complaint with the
20 commission shall sign the complaint under penalty of false
21 statement and set forth in detail the specific charges against
22 the state official, state employee, government contractor or
23 lobbyist and the factual allegations that support the charges.
24 Together with the complaint, a person shall submit to the
25 commission any evidence that the person has that supports the

1 complaint. Evidence may include documents, records and the
2 names of witnesses. The commission may prescribe the forms on
3 which complaints are to be filed.

4 C. The chair of the commission shall sign a
5 complaint initiated by the commission, and the complaint shall
6 set forth in detail the specific charges against the state
7 official, state employee, government contractor or lobbyist and
8 the factual allegations that support the charges.

9 D. Upon receipt of a complaint filed or initiated
10 pursuant to this section, the executive director of the
11 commission shall examine the complaint and make an initial
12 determination as to whether the conduct alleged in the
13 complaint is within the jurisdiction of the commission and
14 warrants investigation. If a complaint is filed against a
15 judge or justice, the complaint shall immediately be referred
16 to the judicial standards commission. The executive director
17 shall bring all other complaints before the commission and make
18 recommendations to the commission regarding whether to proceed
19 with investigations of the complaints.

20 E. The commission may dismiss complaints that are
21 frivolous, unfounded or outside the jurisdiction of the
22 commission. If the commission determines that there is
23 sufficient cause to proceed with the investigation of a
24 complaint, the executive director shall initiate an
25 investigation to determine whether probable cause may exist to

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1 believe that the respondent's alleged conduct constituted an
2 ethics violation. As soon as practicable, the executive
3 director shall notify the person who filed the complaint and
4 the respondent of the disposition of the complaint. The
5 executive director shall also notify the respondent of the
6 general nature of the complaint and the investigation.

7 F. As part of the investigation, the executive
8 director may interview witnesses and examine books, documents,
9 records and papers reasonably related to the complaint. All
10 testimony in an investigation shall be under oath, and the
11 respondent shall have the right to be represented by legal
12 counsel. If the executive director determines that the
13 testimony of any person or the production of books, documents,
14 records or papers is required in the investigation, the
15 executive director shall request the commission to request the
16 district court to issue the appropriate subpoena under seal.

17 G. In any investigation or hearing held under the
18 provisions of this section, the commission shall have the power
19 to administer oaths and, with the concurrence of at least six
20 of the members of the commission, may petition a district
21 court, under seal, to subpoena witnesses, compel their
22 attendance and examine them under oath or affirmation and to
23 require the production of any books, records, documents or
24 other evidence it deems relevant or material to an
25 investigation upon a showing of probable cause. Any challenge

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1 to a subpoena shall be heard by the district court in a
2 confidential proceeding.

3 H. The executive director shall present a written
4 report of the investigation to the commission. The respondent
5 and the respondent's legal counsel may attend and participate
6 in the meeting, and the executive director shall provide
7 reasonable notice to the respondent in writing of the date,
8 time and place of the meeting. Notwithstanding the provisions
9 of the Open Meetings Act, meetings of the commission held for
10 the purpose of an investigation conducted pursuant to this
11 section are closed to the public.

12 I. If the commission finds that, based on the facts
13 in the investigation report and the facts alleged in the
14 complaint, probable cause exists to believe that the
15 respondent's alleged conduct constituted an ethics violation,
16 the commission shall issue a written report of its findings.
17 The report shall include findings of fact and conclusions of
18 law. If the respondent is a state official of the executive
19 branch or state employee of the executive branch, the written
20 report may include a public reprimand or censure regarding the
21 respondent's behavior or recommendations for disciplinary
22 action against the respondent.

23 J. The commission shall publicly disclose a report
24 issued pursuant to Subsection I of this section. The
25 commission shall also transmit the report and provide all

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1 evidence collected during its investigation to the respondent,
2 the attorney general and the:

3 (1) respondent's appointing authority if the
4 respondent is a state official appointed to an office of the
5 executive branch;

6 (2) appropriate legislative body, in the care
7 of the legislative council service, if the respondent is a
8 legislator;

9 (3) appropriate state agency if the respondent
10 is a state employee;

11 (4) respondent's employer if the respondent is
12 a lobbyist; or

13 (5) state agency with which the respondent has
14 a government contract if the respondent is a government
15 contractor.

16 K. If the commission finds that, based on the facts
17 in the investigation report and the facts alleged in the
18 complaint, probable cause does not exist to believe that the
19 respondent's alleged conduct constituted an ethics violation,
20 the commission shall dismiss the complaint and provide a report
21 of its finding in writing to the respondent no later than five
22 days after the finding is made. The report shall include
23 findings of fact and conclusions of law. A commission report
24 issued pursuant to this subsection shall not be public except
25 upon the request of the respondent.

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1 Section 8. COMMISSION INVESTIGATIONS--CONFIDENTIALITY.--

2 All complaints, files, records and communications collected by
3 the commission that pertain to investigations of ethics
4 violations are confidential and are not subject to the
5 provisions of the Inspection of Public Records Act. The
6 commission or any person who receives the evidence collected in
7 a commission investigation pursuant to Subsection G of Section
8 7 of the State Ethics Commission Act shall not disclose the
9 complaints, files, records and communications unless:

10 A. disclosure is required pursuant to the
11 provisions of the State Ethics Commission Act;

12 B. they are offered into evidence at any judicial,
13 legislative or administrative proceeding;

14 C. disclosure is required by law or ordered by a
15 court; or

16 D. the respondent files with the commission a
17 written waiver of confidentiality.

18 Section 9. LIMITATIONS ON JURISDICTION.--

19 A. The commission shall not accept or review
20 complaints concerning conduct that occurred more than three
21 years prior to the day the complaint is received by the
22 commission.

23 B. The commission shall not investigate allegations
24 of misconduct involving campaign advertisements.

25 Section 10. CONFIDENTIALITY--PENALTY.--

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1 A. A person who discloses any confidential
2 complaints, files, records or communications in violation of
3 Section 8 of the State Ethics Commission Act is guilty of a
4 misdemeanor and upon conviction shall be punished by a fine of
5 not more than one thousand dollars (\$1,000) or by imprisonment
6 for not more than one year or both.

7 B. In addition to a penalty imposed pursuant to
8 Subsection A of this section, the court may impose a civil
9 penalty not to exceed ten thousand dollars (\$10,000) for each
10 violation of Section 8 of the State Ethics Commission Act.

11 Section 11. CRIMINAL VIOLATIONS--REFERRAL REQUIRED.--If
12 the commission finds at any time that the respondent's conduct
13 may amount to a criminal violation of state law, the commission
14 shall immediately refer the matter to the attorney general or
15 an appropriate district attorney. The commission shall provide
16 the attorney general or district attorney with all evidence
17 collected during its investigation that may be used in a
18 criminal proceeding. Nothing in this section shall prevent the
19 commission from taking any action otherwise provided in the
20 State Ethics Commission Act nor shall it prevent the commission
21 from deciding to hold a matter in abeyance pending referral of
22 a possible criminal violation of state law.

23 Section 12. COMPLAINTS AND INVESTIGATIONS--TIME
24 LIMITATIONS.--

25 A. If the commission has not scheduled a meeting

1 concerning the disposition of a complaint within ninety days
2 after the complaint is received or initiated by the commission,
3 the executive director shall, as soon as practicable, report to
4 the commission the progress and status of the investigation.
5 The commission may dismiss the complaint or instruct the
6 executive director to continue the investigation of the
7 complaint. Unless the commission dismisses the complaint, the
8 executive director shall report to the commission every ninety
9 days thereafter on the progress and status of the
10 investigation.

11 B. Upon a dismissal or decision to continue an
12 investigation of a complaint pursuant to this section, the
13 commission shall notify the respondent in writing of its
14 action. The commission shall not publicly disclose its action
15 except upon the request of the respondent.

16 Section 13. PROHIBITED ACTIONS.--

17 A. A person shall not take or threaten to take any
18 retaliatory, disciplinary or other adverse action against
19 another person who in good faith:

20 (1) files a complaint with the commission
21 alleging an ethics violation against a state official, state
22 employee or lobbyist; or

23 (2) provides testimony, records, reports or
24 other information to the commission during an investigation
25 conducted pursuant to the State Ethics Commission Act.

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1 B. Nothing in the State Ethics Commission Act
2 precludes civil actions or criminal sanctions for libel,
3 slander or other civil or criminal claims against a person who
4 files a false claim under that act.

5 Section 14. TEMPORARY PROVISION--REPORT ON EXTENSION OF
6 STATE ETHICS COMMISSION JURISDICTION TO LOCAL GOVERNMENTS.--By
7 January 1, 2011, the state ethics commission shall submit a
8 report to the governor, the legislature and the chief justice
9 of the supreme court regarding the extension of state ethics
10 commission jurisdiction to elected and appointed officials and
11 employees of counties, municipalities and school districts.
12 The report shall include and make recommendations on:

13 A. a detailed plan formulated by the commission for
14 implementation of an extension of its jurisdiction, including a
15 proposed timeline;

16 B. the estimated number of additional employees and
17 the amount and type of resources needed by the state ethics
18 commission to carry out its powers and duties if its
19 jurisdiction were extended;

20 C. all estimated budget increases needed and the
21 estimated annual budget for the state ethics commission if its
22 jurisdiction were extended; and

23 D. any changes that are needed to existing law.

24 Section 15. APPROPRIATION.--Five hundred thousand dollars
25 (\$500,000) is appropriated from the general fund to the state
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1 ethics commission for expenditure in fiscal year 2010 to carry
2 out the provisions of the State Ethics Commission Act. Any
3 unexpended or unencumbered balance remaining at the end of
4 fiscal year 2010 shall revert to the general fund.

5 Section 16. APPLICABILITY.--The provisions of the State
6 Ethics Commission Act apply only to conduct that occurs on or
7 after July 1, 2009.

8 Section 17. EFFECTIVE DATE.--

9 A. The effective date of Sections 1 through 5 and 9
10 through 16 of this act is July 1, 2009.

11 B. The effective date of Sections 6 through 8 of
12 this act is January 1, 2010.

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